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IN THE
COURT OF APPEALS OF INDIANA

REMEKO R. GUY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-0012-CR-541
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0002-CF-108

April 27, 2001

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Remeko R. Guy was convicted following a jury trial of Attempted Murder, a Class A felony. He appeals, presenting the following issues for our review:

1. Whether the State presented sufficient evidence to support his conviction.

2. Whether the trial court erred when it refused to give his tendered instruction on Aggravated Battery, a Class B felony, as a lesser included offense of attempted murder.

We affirm.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of February 3, 2000, Sonya Winchell and a group of friends drove to a Taco Bell fast food restaurant in Fort Wayne. Winchell pulled her car into the drive-thru lane of the restaurant directly behind a vehicle being driven by Ariel Graham and in which Guy was a passenger. When Guy and Graham exited their vehicle to exchange seats, Winchell yelled at the couple about the delay they were causing. Graham walked back to Winchell's car, where a verbal confrontation ensued. The confrontation became physical when the two women began flailing and punching at one another. Guy then approached Winchell's car, leaned into the passenger compartment, and demanded to know if anyone had "a problem with [his] girl." Record at 214. Winchell, while still seated in her car, turned and struck Guy in the nose. Guy subsequently drew a .380 automatic handgun from his pocket, pointed the gun at Winchell's chest, and fired. The bullet entered Winchell's lower chest area, passed through her liver, and exited out her back. Winchell survived the shooting.

The State charged Guy with attempted murder, a Class A felony. At trial, Guy tendered a jury instruction on aggravated battery, a Class B felony, as a lesser included offense of attempted murder. The trial court refused to instruct the jury on aggravated battery, and the jury found Guy guilty of attempted murder as charged. The trial court entered judgment of conviction and sentenced Guy to forty years in the Indiana Department of Correction.[1] He now appeals.

DISCUSSION AND DECISION

Issue One: Sufficiency of the Evidence

Guy contends that the State presented insufficient evidence to support his conviction of attempted murder. In particular, Guy asserts that the State failed to prove he possessed the requisite intent to kill Winchell. We disagree.

When reviewing challenges to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Kimbrough v. State, 622 N.E.2d 230, 231 (Ind. Ct. App. 1993). Rather, we look at the evidence most favorable to the conviction and all reasonable inferences to be drawn therefrom. Id. The conviction will be upheld if there is evidence of probative value from which a reasonable trier of fact could infer guilt beyond a reasonable doubt. Id.

To obtain a conviction for attempted murder, the State was required to prove beyond a reasonable doubt that Guy, while acting with the specific intent to kill Winchell, engaged in conduct constituting a substantial step toward killing her. See Blanche v. State, 690 N.E.2d 709, 712 (Ind. 1998); Ind.Code §§ 35-42-1-1 and 35-41-5-1. A person

[1] We heard oral argument in this case at Marion High School on April 12, 2001.

engages in conduct intentionally if, when he engages in the conduct, it is his conscious objective to do so. Ind.Code § 35-41-2-2. Intent is a mental function and, absent admission, it must be determined by courts and juries from a consideration of the defendant's conduct and the natural and usual consequences of such conduct. Metzler v. State, 540 N.E.2d 606, 609 (Ind. 1989). Because intent is a mental state, the trier of fact must usually resort to reasonable inferences based upon an examination of the surrounding circumstances to determine whether, from the person's conduct and the natural consequences that might be expected from that conduct, a showing or inference of intent to commit that conduct exists. Id. As it relates to the crime of attempted murder, the specific intent to kill may be inferred from the deliberate use of a deadly weapon in a manner likely to cause death or serious bodily injury. Bethel v. State, 730 N.E.2d 1242, 1245 (Ind. 2000). Our courts have consistently upheld convictions for attempted murder where the evidence indicates that a weapon was fired in the direction of the victim. Id.; see, e.g., Blanche, 690 N.E.2d at 712 (finding specific intent to kill where defendant pointed gun directly at victim and discharged gun in close proximity to victim); Shelton v. State, 602 N.E.2d 1017, 1021 (Ind. 1992) (finding specific intent to kill where defendant pointed handgun at victim and shot him twice from distances of twelve and thirty feet).

In the present case, Guy drew a .380 automatic handgun and, while standing immediately outside Winchell's vehicle, fired the gun at her chest. Five eyewitnesses saw Guy draw the gun, reach or lean into Winchell's car, and shoot. Ryan Messman, one of Winchell's passengers, testified that the flash from the gun discharging occurred inside

the vehicle. Jennifer Relue, another passenger, testified that Guy shot Winchell at such close range that the gun "was touching [Winchell's] chest when it went off." Record at 314. This evidence was more than sufficient to support the jury's conclusion that Guy had the specific intent to kill Winchell when he fired the gun. Although Guy testified at trial that he did not intend to shoot Winchell and that when he pulled the gun out of his pocket, "[i]t just went off[,]" Record at 388, the jury was not bound to accept his theory that the gun fired accidentally. See Burgess v. State, 461 N.E.2d 1094, 1099 (Ind. 1984). Guy's appeal amounts to a request that we reweigh the evidence and assess the credibility of the witnesses, tasks not within our prerogative on appeal. We therefore conclude that his conviction for attempted murder is supported by sufficient evidence.

Issue Two: Jury Instruction

Guy next argues that the trial court erred when it refused to give his tendered instruction on aggravated battery, as a lesser included offense of attempted murder. Again, we must disagree.

Our supreme court has enunciated a three-step analysis to determine whether an instruction on a lesser included offense should be given. See Wright v. State, 658 N.E.2d 563, 566-67 (Ind. 1995). First, a trial court must compare the statute that defines the crime charged with the statute that defines the alleged lesser included offense, to determine whether the lesser included offense is inherently included in the crime charged. Taylor v. State, 659 N.E.2d 1054, 1059 (Ind. Ct. App. 1995), trans. denied. Second, if a trial court determines that an alleged lesser included offense is not inherently included in the crime charged under step one, then it must compare the statute which defines the

alleged lesser included offense with the charging instrument in the case. Id. at 1060. If the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense, then the alleged lesser included offense is factually included in the crime charged. Id. If the alleged lesser included offense is neither inherently nor factually included in the crime charged, then the trial court should not give a requested instruction on the alleged lesser included offense. Id. If, however, a trial court has determined that an alleged lesser included offense is either inherently or factually included in the crime charged, it proceeds to the third step. Id.

Step three of the analysis requires the court to determine whether a "serious evidentiary dispute" exists as to which offense was committed by the defendant, given all the evidence presented by both parties. Evans v. State, 727 N.E.2d 1072, 1081 (Ind. 2000). If a serious evidentiary dispute does exist, it is reversible error not to give a requested instruction on the inherently or factually included offense. Id. If the evidence does not so support the giving of a requested instruction on an inherently or factually included offense, then a trial court should not give the requested instruction. Taylor, 659 N.E.2d at 1060.

Here, the record discloses, and the State concedes, that the offense of aggravated battery is factually included in the charge of attempted murder. See Spry v. State, 720 N.E.2d 1167, 1170 (Ind. Ct. App. 1999), trans. denied; Jackson v. State, 698 N.E.2d 809, 813 (Ind. Ct. App. 1998) (observing that aggravated battery is lesser included offense of attempted murder if charging information contains all essential elements necessary to

convict defendant of battery), trans. denied. Indiana Code Section 35-42-2-1.5 defines aggravated battery as follows:

> A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:
>
> (1) serious permanent disfigurement;
>
> (2) protracted loss or impairment of the function of a bodily member or organ; or
>
> (3) loss of a fetus;
>
> commits aggravated battery, as Class B felony.

The State charged Guy with "discharging a firearm at and/or against the body of Sonya S. Winchell" with the intent to kill her. Record at 10. This charge alleges conduct that would have constituted the separate offense of aggravated battery under Indiana Code Section 35-42-2-1.5. See Spry, 720 N.E.2d at 1170 (finding double jeopardy violation where defendant was convicted of both aggravated battery and attempted murder where both convictions arose from the same evidence of stabbing); see also Redman v. State, 679 N.E.2d 927, 928 (Ind. Ct. App. 1997) (observing that, under double jeopardy principles, defendant could not be convicted of both attempted murder and aggravated battery when two offenses are based upon one act – pulling the trigger), trans. denied. Accordingly, we proceed to step three of the analysis.

The critical element distinguishing the crime of aggravated battery from the charge of attempted murder in this case is intent - the specific intent to kill or the intent to inflict injury upon a person that creates a substantial risk of death. See I.C. §§ 35-42-1-1 and 35-41-5-1; I.C. § 35-42-2-1.5; see also Evans, 727 N.E.2d at 1081 (observing that critical element distinguishing involuntary manslaughter and murder is intent - intent to kill or intent to batter). An instruction on the lesser included offense of aggravated

battery would be warranted only if there is a serious evidentiary dispute about what Guy intended to do - kill or injure. See Brown v. State, 659 N.E.2d 652, 656 (Ind. Ct. App. 1995) (discussing propriety of involuntary manslaughter instruction as lesser included offense of murder), trans. denied. The trial court found, and the record reveals, no serious evidentiary dispute concerning whether Guy intended to kill Winchell or merely injure her.

To begin with, there is no evidence - or assertion by Guy - that he intended to injure Winchell. Cf. Lynch v. State, 571 N.E.2d 537, 539 (Ind. 1991) (concluding that defendant charged with murder was entitled to involuntary manslaughter instruction where defendant testified his intent was only to injure); cf. also Pedrick v. State, 593 N.E.2d 1213, 1217 (Ind. Ct. App. 1992) (concluding that defendant charged with child molesting was entitled to battery instruction where his defense was that touching was not intended to be sexual). To the contrary, Guy testified at trial that the shooting was an accident, that he had no intention of shooting Winchell, and that when he drew the gun from his pocket, "[i]t just went off." Record at 388. Therefore, he was not claiming that he possessed a lesser degree of culpability such that a jury could conclude he had committed aggravated battery rather than attempted murder. See Taylor, 659 N.E.2d at 1060. Instead, Guy claimed that he did not possess any culpability whatsoever by presenting a defense that his conduct did not constitute a crime, attempted murder or otherwise, because the shooting was an accident. See Wilson v. State, 697 N.E.2d 466, 475 (Ind. 1998) (upholding trial court's refusal to give instruction on reckless homicide as lesser included offense of murder where defendant raised insanity defense, which, if

successful, "would make [him] nonculpable for any offenses he may have committed"); see also Brackens v. State, 480 N.E.2d 536, 541 (Ind. 1985) (upholding trial court's refusal to give instruction on battery as lesser included offense of child molesting where defendant denied touching victim). Indeed, the trial court noted that Guy "personally foreclosed the middle ground [of a lesser included offense of aggravated battery] by his testimony regarding accident, so that the jury ha[d] a choice between attempted murder and the theory of accident which carries with it no criminal responsibility." Record at 419-20.

In sum, any dispute raised by the defense of accident concerned whether Guy had any culpable intent at all. See Wilson, 697 N.E.2d at 475 (addressing insanity defense). The "serious evidentiary dispute" contemplated by our supreme court, however, "is a dispute over which offense a defendant may have committed, the lesser or the greater." Id. While Guy testified that he did not possess the specific intent to kill Winchell, his testimony did not create a serious evidentiary dispute as to which offense he had committed - attempted murder or aggravated battery. See Evans, 727 N.E.2d at 1081; see also Wilson, 697 N.E.2d at 475. Moreover, an instruction on aggravated battery would have been inconsistent with the evidence presented by both the State and the defense. See Brackens, 480 N.E.2d at 541. Absent evidence to support the giving of an instruction on aggravated battery, as a lesser included offense of attempted murder, the trial court did not err when it refused to give such an instruction.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.